Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

JOHN C. JUSTICE,
Petitioner

vs.

SECRETARY OF LABOR,
Respondent

Petition for Writ of Certiorari to
The Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May the Court accept a lesser standard for validating a complaint against an "employer" than the mandatory language that the act of the Congress, in clearly-defined unambiguous terms, requires?

Does the jurisdiction of the United States extend beyond the powers granted by the States under the Constitution for the United States of America in Article I, Section 8, clause 17, and Article IV, §3, clause 2 as limited by Amendments Nine and Ten to the Constitution for the United States of America?

Is the express will of the Congress set forth in the Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(C), (D), and (E), applicable to the Occupational Safety

and Health Administration, and are the consequences of failure to follow that Act the consequences set forth by the Congress?

Was the Respondent properly held in contempt for refusing to honor a fraudulently applied-for and improperly issued administrative warrant?

Is the Occupational Safety and Health Act of 1970 Constitutional as applied to an individual claiming citizenship within a State rather than the United States?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties are all named in the caption of the case. Lynn Martin is the current Secretary of Labor.

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STATUTES AND REGULATIONS INVOLVED

FUNDAMENTAL ORGANIC LAW,

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Declaration of Independence

Article II of the Articles of Confederation

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The Occupational Safety and Health Act of 1970

§(2)(b)(3)

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29 CFR § 1903.11(a)

The Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(C), (D), and (E)

CITATION OF THE CASE

The instant case for which a Writ of Certiorari is sought was case number 90-2581 in the Seventh Circuit Court of Appeals, reported at 951 F.2d 121 (1992).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) The United States Court of Appeals for the Seventh Circuit issued its opinion captioned "In the Matter of the Establishment Inspection of Microcosm; Appeal of: John C. Justice, doing business as Microcosm", Docket # 90-2581 on December 17, 1991.

(ii) No Petition for Rehearing was filed with the Seventh Circuit. An Order, No. A-734, entered by Justice John Paul Stevens on April 3, 1992, extended the time for filing to and including April 15.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254(1). 28 U.S.C. 2201 also applies, in as much as your petitioner seeks declaratory judgment as to his rights, as

heretofore set forth in Hale v. Henkel, 201 U.S. 43, 75 (1906), and declared frivolous by the Seventh Circuit Court of Appeals.

The Constitutionality of the Occupational Safety and Health Act of 1970 is drawn into question by the petitioner as applied to him. No Court has certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), the fact that the constitutionality of an Act of Congress was drawn into question, all Courts having stated that the issues raised by your petitioner are frivolous.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Declaration of Independence

Article II of the Articles of Confederation

Article I, §8, cl. 3 of the Constitution

Article I, §8, cl. 17 of the Constitution

Article VI, cl. 2 of the Constitution

Fourth Amendment to the Constitution

Fifth Amendment to the Constitution

Ninth Amendment to the Constitution

Tenth Amendment to the Constitution

The Occupational Safety and Health Act of 1970

§(2)(b)(3)

§8(f)(1)

29 CFR § 1903.11(a)

OSHA Field Operations Manual Ch IX

STATEMENT OF THE CASE

The Occupational Safety and Health Administration (OSHA) district office in Calumet City, Illinois, allegedly received on February 10, 1989, a handwritten complaint made by an alleged friend of a person alleged to be an "employee of Microcosm" working in the Respondent's building in Cicero, Illinois, which alleged that an operation was being conducted where, "The smell from solvents used in the factory is so bad, my friend is sick practically every day." The complaint was dated January 30, 1989. (R.O.A., p. 25)

A letter dated February 22, 1989, was prepared over the signature of the Area Director of OSHA setting forth the allegations, (R.O.A., p. 35) but without a copy of the alleged complaint from a friend, or a statement that the complaint

was referred by a "friend", which stated that, "If we do not receive a response from you within 10 calendar days or less indicating that appropriate action has been taken or that no hazard exists and why, an inspection may be conducted." (R.O.A., p. 36, ppg. 1)

The Respondent replied on March 4, 1989, stating that, "I have enquired exhaustively and have found no one at this address who has complained to your agency as set forth in your letter dated February 22, 1989, to which I am replying timely as requested." (R.O.A., p. 40) The letter requested the name of the complainant under the Freedom of Information Act.

The Director did not consider that letter responsive and wrote two additional letters dated June 8, and June 30, 1989, (R.O.A., pp. 38,39) demanding a response.

The Respondent replied on July 12, 1989,

noting that the letter of March 4 had been received by OSHA in as much as a letter stating that revelation of the identity of complainants was prohibited under the Occupational Safety and Health Act of 1970 (the Act).

On August 30, 1989, Rick A. Foor, who alleged that he was a duly authorized compliance officer of the Occupational Safety and Health Administration (R.O.A., p. 24) attempted to inspect the Respondent's building and was denied entry by the Respondent (R.O.A., p. 25) who informed Foor that he lacked territorial jurisdiction to enter upon the Respondent's property.

On September 7, 1989, Eugene Saturn called the Respondent and attempted to elicit damaging admissions and confessions by leading questions, suggesting that, "You say your employees deny getting sick

from solvent vapors?" The Respondent said, "No, let me see what I said." And reaching for the file containing the letter of March 4, continued, "I said, 'I have enquired exhaustively and have found no one at this address who has complained to your agency as set forth in your letter dated February 22, 1989.' You are wasting my time, and I am sure I am wasting yours," and hung up the phone, there being no obligation under the Fifth Amendment to the Constitution to give even so much as the time of day to unsolicited phone callers. (R.O.A., p. 25, end ppg.)

The Petitioner, the Secretary of Labor, sought a warrant for administrative inspection of the Respondent's building on the complaint of Rick A. Foor before Magistrate James T. Balog, on October 16, which was granted. (R.O.A., p. 11)

On October 17, 1989, compliance officer

Foor appeared to serve the warrant and perform the inspection. The Respondent denied entry on grounds that the warrant was not signed by a judge and that the federal government does not have jurisdiction within the States except on lands that have been ceded to the federal government. (R.O.A., p. 13)

On October 18, 1989, Maria P. Peterson, attorney for the Petitioner, wrote to the Respondent stating that, "A magistrate is granted and possesses the same judicial authority as a district court judge," and, "because you use goods and materials that have been produced out-of-state OSHA therefore has jurisdiction over your business." She advised that, "if I do not hear from you within 48 hours of receipt of this letter, further legal action will be taken to enforce the warrant for inspection to enter Microcosm and for

attorney fees and cost to reimburse this office for the cost of enforcing this warrant." (Exhibit 6)

On October 18, 1989, the Respondent had already filed a Motion to Quash Warrant for Inspection under the Occupational Safety and Health Act of 1970, with service on compliance officer Foor. (Exhibits 7 and R.O.A., p. 145) In filing the motion in Magistrate Balog's Clerk's office and viewing the contents of the file, the Respondent first became aware that the complaint of the alleged friend of an alleged employee, was anonymous.

On receipt of Ms. Peterson's letter, the Respondent called her and stated that he had filed a motion to quash, set for hearing on the 25th, and had served compliance officer Foor.

On the 25th, jurisdiction to reconsider the issuance of the warrant was denied by

the Magistrate. The Respondent argued before Magistrate Balog that the statute mandated that complaints to OSHA be signed.

The Petitioner pressed for sanctions in the District Court, where argument and briefing continued from October 31 until December 5, 1989, although Notice of Appeal from the Magistrate's decision and from the initial hearing in the Court of Judge Ann Claire Williams on an Order to Show Cause why the Respondent should not be held in contempt was taken on November 3, 1989. On discovery that the Respondent had indeed appealed to the Court of Appeals, Judge Williams ruled that she did not have jurisdiction to impose sanctions while the case was on appeal. (Tr. December 5, 1989, p. 5, l. 21)

On February 15, 1990, the Petitioner's

second Motion for Ruling on Previous Motion for Sanctions was before the Court. The Respondent noted that he had moved for voluntary dismissal of his appeal to the Seventh Circuit to purge himself of contempt, that he had as a condition of that dismissal agreed to an inspection by OSHA, albeit against his will and over his objection, that there was no objection to the inspection's being made that day.

The inspection was made, the Respondent replied to the Petitioner's Motion for Ruling on Previous Motion for Sanctions, and the Petitioner responded to that. On May 23, the District Court issued its Order, from which the Respondent appealed on July 20, 1990.

Oral argument was heard on April 15, 1991; the Seventh Circuit Court of Appeals issued its opinion on December 17, 1991, affirming the finding of contempt and the

award of attorneys' fees and reversing the monetary sanction.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction to initiate this case was claimed by the Occupational Safety and Health Administration, "OSHA". The first act in the courts was the seeking of an administrative inspection warrant by a man who claimed to be an OSHA compliance officer, Rick A. Foor, who presented an Application for Inspection Warrant before Magistrate James T. Balog. Your petitioner, John C. Justice, refused to honor the warrant, and moved Magistrate Balog to quash the warrant, which was denied. Justice told the assistant Solicitor of Labor that he intended to appeal Magistrate Balog's ruling. The case, 89 M 353, was moved under an Order to Show Cause, Case No. 89 C 8020, before Judge Ann Claire Williams.

ARGUMENT

May the Court accept a lesser standard for validating a complaint against an "employer" than the mandatory language that the act of the Congress, in clearly-defined unambiguous terms, requires?

The Occupational Safety and Health Act of 1970, "the Act", provides in §8(f)(1) that, "Any such notice [complaint about working conditions] shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees..." (Emphasis added.)

Because the probable cause, or basis, for the inspection in this case was the

anonymous complaint,[1] OSHA must conform to the requirements of the Act, not of the lesser standard set forth in the Field Operations Manual, "FOM," nor the ruling of the Seventh Circuit in Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313, 1321-22 (7th Cir. 1980). Burkart Randall has no cases opposing it and a writ of certiorari was not sought. The Seventh Circuit opinion states,

> "Without citing alternative case law or addressing our reasoning in Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313, 1321-22 (7th Cir. 1980), in which we held that anonymous complaints were valid, Justice merely asserts that our decision was wrong. Despite the appellant's disagreement with our

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[1] See Application for Inspection Warrant, in Appendix.

precedent, however, Burkart Randall is dispositive of his argument:

> " 'Section 8(f)(1) [29 U.S.C. § 657(f)(1)] does not, however, prescribe minimum requirements for acceptance of an employee complaint by OSHA. Rather, it identifies a particular set of circumstances under which OSHA must inspect in response to an employee complaint. We can find no indication in the Act or in judicial interpretations of section 8(f)(1) that OSHA may not determine that an inspection is justified on the basis of an informal employee complaint. Indeed, one court has noted that OSHA
>
> > " ' 'is required to investigate all

> complaints whether formal (signed by someone) or anonymous (from a confidential informant, so to speak).'
>
> " 'Dravo Corp. v. Marshall, 5 OSHC (BNA) 2057, 2059 W.D.Pa. 1977, aff'd mem., 578 F.2d 1373 (3d Cir. 1978). While we need not decide whether OSHA must inspect in response to all complaints, we can find no basis for holding that only those complaints which comply with section 8(f)(1) may form the basis for an OSHA inspection.'

"Burkart Randall, 625 F.2d at 1321-22. Thus, the anonymous nature of

the complaint that provided the basis for the inspection warrant fails to invalidate it."

The salient significance of the Congressional mandate in the Act at section 8(f)(1) that complaints shall be signed, is that malicious allegations by persons who would take pleasure in causing problems for a victim of OSHA would be more difficult to make. Those with a tendency toward paranoia can imagine any number of persons who might have made malicious anonymous complaints. OSHA preserves the anonymity of a known complainant who desires it as provided by Section 8(f)(1). Thus, failure to sign a complaint disqualifies it as a valid complaint. OSHA may make an inquiry, and your petitioner has no objection to an inquiry, but if the inquiry is answered no further investigation is justified,

especially seeking a warrant based upon an anonymous complaint.

OSHA employees lied about the identity of the complainant in the instant case: in both the initial letter and the letter of June 8, 1989, they state that, "A copy of this letter is being sent to the person reporting the hazardous conditions." The complainant was either anonymous as internal records state, or was known as stated in the instant quotation. In letters of June 8 and 30, 1989, the Area Director stated that OSHA had not received a reply to their initial letter, although their letter of March 10 was written in answer to the reply to their initial letter.

The Warrant for Inspection under the Occupational Safety and Health Act of 1970 issued by Magistrate James T. Balog was without probable cause required by the

standard of the Act at Section 8(f)(1), and therefore, even under the lesser standards for administrative inspections set by this Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), this warrant was issued in violation of the Fourth Amendment to the Constitution.

In Boyd v. United States, 116 U.S. 616, 630 (1886), this Court said,

> "Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures?....The struggles

> against arbitrary power, in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."

There have been hundreds of cases since Boyd which may be distinguished in minutiae one from the other. One such which applies to your petitioner follows:

> "It is said to us that therefore there is no prohibition against searches of private homes by government officers, unless they are searching for evidence of crime; that if they are searching for evidence of

crime, they must get a search warrant, but that if they are searching for something else or are just searching, they need not get a search warrant; for searchers of the latter sort, we are told, home owners must open their front doors upon demand of an officer without a warrant. The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of

civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. ..... To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

"The argument involves a basic error in reasoning in respect to the Constitution's Bill of Rights. The Fourth

Amendment did not confer a right upon the people. It was a precautionary statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the Amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely

> the true posture of rights and the limitations thereon." District of Columbia v. Little, 178 F.2d 13 (1950) (Emphasis added.)

The diminished expectation of privacy in commercial property alluded to by the Secretary (Br.S.o.L. 22, footnote 19) should not apply to your petitioner. The building at 1699 S. 55th Avenue, also addressed as 1801 S. 55th Avenue, is your petitioner's home and has been since 1976 when the building was conveyed to him. The fact that it is bigger than the average home does not negate the fact that it is his home; there is no sign outside inviting the public, nor is the door open to the public (or to government inspectors.)

Does the jurisdiction of the United States

extend beyond the powers granted by the States under the Constitution for the United States of America in Article I, Section 8, clause 17, and Article IV, §3, clause 2, as limited by Amendments Nine and Ten to the Constitution for the United States of America?

It is obvious that the government of the United States is operating in many areas beyond the limits set forth in Article I, Section 8, clause 17, with the approval of the citizenry and the daily expansion of authority legislated by the Congress, but is this occurring only because no one has objected? Your petitioner has no privileges from the federal government and has no contracts with it. There is no jurisdiction over him except when he is on federal territory; the State of Illinois, which under the Constitution is guaranteed a

Republican form of government, is not a federal territory.

The jurisdiction of the United States is limited by Article I, Section 8, clause 17, and Amendments IX and X to the Constitution. The granted power is:

> "The Congress shall have Power.....To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful

Buildings;...."

Amendment IX. to the Constitution for the United States provides that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

and Amendment X. mandates that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Relevant to the current issues may also be the welfare clause found in Article I, Section 8, clause 1:

> "The Congress shall have Power To....provide for the common Defence and general Welfare of the United States;..."

and the commerce clause, found in clause 3 of Article I Section 8

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The power granted is to regulate commerce among the several States, not within them. It borders on the ridiculous to assert from a historical point of view that the States in cautiously abandoning their absolute sovereignty under the Articles of Confederation, would embrace control of the affairs of businesses within their borders by a federal government. It does not matter in the least that the Articles of Confederation in Article II say,

> "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is

> not by this confederation expressly delegated to the United States, in Congress assembled." (Emphasis added.)

because the statement in Amendment X to the Constitution is exactly equivalent to the statement of Article II of the Articles of Confederation. A "no" is a prohibition to the federal government whether it is "expressly no" or not. The surrender of State sovereignty was not the intent of the Framers, and such a plan would have been rejected without second consideration by the States. Much of The Federalist Papers, reputedly authored by James Madison, Alexander Hamilton, and John Jay, was devoted to convincing the citizenry that no wholesale surrender of their liberties to a federal government was intended. The record of the Convention in Philadelphia in 1787 as made

by James Madison in his Notes [one of Documents Illustrative of the Formation of the Union of the American States, Charles C. Tansill, editor, House Document No. 398, Government Printing Office, Washington, 1927. Reprinted by Spencer Judd Publishers, Sewanee, Tennessee] reveals a jealous caution for the sovereignty of the States.

The Congress may regulate how the Appellant ships goods from Illinois to another State, if the time should come when he might consider engaging in interstate commerce, through its regulation of common carriers and whether they will accept or reject his shipments as prescribed by the rules they are compelled to follow, but not how he produces the goods, or the facilities that he uses.

The same historical arguments apply to

the general welfare and to the limiting of federal jurisdiction to those areas ceded to the federal government by the States. The Constitution is the fixed law on which all law in these united States is constructed, pursuant to Article VI, clause 2,

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Because the meanings of words may be expanded to include meaning that they did not have at an earlier time, it is

essential to determine the meaning and intent of the Framers of the Constitution and the people who ratified it, making it our supreme law.

The feelings of one of the people of the States prior to the ratification of the Constitution are expressed in the essay entitled "Address by Cato Uticensis" which was printed in the Virginia Independent Chronicle on October 17, 1787. The essayist said,

> "It has been the language, since the peace, of the most virtuous and discerning men in America, that the powers vested in Congress were inadequate to the procuring of the benefits, that should result from the union: It was found, that our national character was sinking in the opinion of foreign nations, and that the selfish views of some of

the States were likely to become the source of dangerous jealousy; the requisitions of Congress were set at naught; the Government, that represented the Union, had not a shilling in its Treasury to enable it to pay off the Federal debts, nor had it any method within its power to alter its situation; it could make treaties of commerce, but could not enforce the observance of them, and it was felt, that we were suffering from the restrictions of foreign nations, who seeing the want of energy in our Federal Constitution, and the unlikelihood of co-operation in thirteen separate Legislatures, had shackled our commerce, without any dread of recrimination on our part: To

obviate these grievances, it was, I believe, the general opinion, that new powers should be vested in Congress, to enable it, in the amplest manner, to regulate the commerce, to lay and collect duties on the imports, of the United States. Delegates were appointed by most of them, for these purposes, to a Convention to be held at Annapolis in the September before last; a few of them met, and without waiting for the others, who were coming on, they dissolved the Convention, after resolving among themselves, that the powers vested in them were not sufficiently extensive, and that they would apply to the Legislatures of the several States, which they represented, to appoint members to

another Convention, with powers to new model the Federal Constitution. This, indeed, it has now done in the most unequivocal manner, nor has it stopped here, for it has fairly annihilated the Constitution of each individual state. It has proposed to you a high prerogative government, which, like Aaron's serpent, it to swallow up the rest: this is what the thinking people in America were apprehensive of; they knew how difficult it is to hit the golden mean, how natural the transition is from one extreme to the other; from anarchy to tyranny; from the inconvenient laxity of thirteen separate Governments to the too sharp and grinding one, before which our sovereignty, as a state, was to vanish." [Emphasis

> added in bold lettering.] The Complete Anti-Federalist, volume 5, page 121, ppg 5.7.4, Herbert J. Storing, editor, The University of Chicago Press, 1981.

Lest this be interpreted as a plea for ratification of the Constitution, Cato concludes,

> "The ingenious Lord Shaftsbury has said, that a wheel within a wheel was an absurdity in politics; but, where was this ever so manifest, as in this Foederal Constitution. The phantom of sovereignty, which is left the state, enables it to legislate in many instances, and lay taxes; to have its taxgatherers and excisemen too. Unhappy situation where the natural jealousy, and the pride inherent in two separate

governments, presiding over the same people, will induce them to vie in the race of taxation to snatch the prize, the spoils of the citizen, that is to glut the vanity of their respective consequence! he, who has meditated on man, and the secret springs, which move him, must expect this. Unhappy situation where two rival excisemen battle at your doors for precedence in seizing these spoils!--In the name of God look well before you leap, consider, that the question is, whether, you would rather be a sovereign or a sharer in sovereignty: whether, as only a few from their abilities and consequence can expect to be delegated, in rotation, to Congress, you are not about to lay

the foundation of a dangerous aristocracy. Whether, it is, not more likely that the blaze of LIBERTY will be kept alive among us, when watched on thirteen separate Altars, than when re-united into one, be it ever so refulgent. Consider, whether you are willing to see the state of Virginia dwindle into the insignificance of a town corporate: and as the Mayor Court of aldermen and common-council in this make by-laws for its own government, you are satisfied with a Governor, Senate and Assembly, which will have the same authority as 'the United States shall guarantee to every state in this Union a republican FORM of government.' Consider that if you pass the

> Foederal Constitution *in toto*, you subject yourselves to see the doors of your houses, them impenetrable castles of freemen, fly open before the magic wand of an exciseman, and, that, if you would resent and punish the insolence of office, the daring brutality of the *publican*, perhaps offered to the wife of thy bosom, you will be dragged for trial before a distant tribunal, and there, perhaps, condemned without enjoying the benefit of a jury from your vicinage, your unalienable birthright as a freeman." *Id.*, pp. 123-4. (Emphasis in the original.)

The justifiable fears of the anti-federalists were soothed by debate in the media and by the addition of ten amendments before ratification, which

amendments, and especially Amendments IX and X, guarantee the sovereignty of the people and the States and restrain the federal government within its intended bounds, so long as there are freemen to demand it.

If that be not the case, we find ourselves in a more perilous situation than we were two hundred years ago, when,

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. .... --He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance....--He has combined with others to subject us to a jurisdiction foreign to our constitution,

and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation;..." from The Declaration of Independence--1776

Is the express will of the Congress set forth in the Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(C), (D), and (E), applicable to the Occupational Safety and Health Administration of the Department of Labor, and are the consequences of failure to follow that Act the consequences set forth by the Congress?

In footnote 4 of the opinion of the Court of Appeals, the Court says,

> "Justice seems to argue that if there is not specific authorization in the Federal Register as required

under the Administrative Procedures Act, 5 U.S.C. § 552(a)(1), any inspection based upon an informal complaint is invalid. But as a number of courts have held, not all delegations of authority 'must be published in order to be effective. (Your petitioner is not objecting to the "effectiveness" of the non-published regulations--he objects to their being in violation of the express will of the Congress set forth in the Administrative Procedures Act.) Under the provisions of 5 U.S.C. § 552, the requirement for publication attaches only to matters which if not published would adversely affect a member of the public.' [Citations given.] Justice certainly was not prejudiced from the complaint being

anonymous, since 29 U.S.C. § 657(f)(1) provides that 'upon the request of the person giving such notice [of an OSHA violation], his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section.' Thus, it is immaterial whether authority to investigate informal complaints is published in the Federal Register."

"In a similar vein, the appellant challenges the authority of the attorney for the Department of Labor to initiate this suit and the authority of the compliance officer to enforce OSHA regulations. Justice has failed to demonstrate prejudice from the failure to publish the

specific authority granted to these individuals, as it is immaterial which persons carry out the delegated authority of the Secretary of Labor."

Your petitioner would have thought that it is obvious that the three years of his life spent in litigating the issues raised by OSHA's proceeding without having published its "specific authorization in the Federal Register as required under the Administrative Procedures Act, 5 U.S.C. § 552(a)(1)" and the 12,840.00 in penalties capriciously determined by agents who had no delegation of authority published "in the Federal Register as required under the Administrative Procedures Act, 5 U.S.C. § 552(a)(1)" are sufficient to demonstrate prejudice from the failure to publish the specific authority granted to these individuals. Any indicted person brought

to a criminal trial may rejoice at a verdict of not guilty, but the finding of innocence does not expunge the duress of the trial. The Settlement Agreement reached under duress in the concurrent proceedings before the Occupational Safety and Health Review Commission followed inter alia a Motion to Dismiss for A.P.A. Violations which was denied, although a case before the Federal Mine Safety and Health Review Commission, Secretary of Labor, Mine Safety and Health Administration v. Sanger Rock & Sand, Docket No. WEST 88-275-M, A.C. No. 04-01937-05505 and Docket No. WEST 89-71-M, A.C. No. 04-01937-05506 was dismissed in a post-hearing motion for failure of the inspectors to have published delegations of authority. See your petitioner's Affidavit regarding the manner in which the Settlement Agreement was reached in

the Supplementary Appendix.

The Seventh Circuit's bemusement with your petitioner's pleadings shown by its suggestion that "Justice seems to argue that if there is not specific authorization in the Federal Register as required under the Administrative Procedures Act, 5 U.S.C. § 552(a)(1), any inspection based upon an informal complaint is invalid," is incomprehensible in view of the clear meaning of the statute, in which the intent of the Congress is hardly subject to misinterpretion.

> "Whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the

> government stays within the bounds of his authority...." Federal Crop Ins. v. Merrill, 332 U.S. 380, 384 (1947)

Was the Respondent properly held in contempt for refusing to honor a fraudulently applied-for and improperly issued administrative warrant?

A subsidiary question fairly included in the primary question is, may a magistrate act beyond the powers set forth in the orders of the District Court prescribing his duties?

Magistrate James T. Balog did not have authority to issue the warrant for inspection under the Occupational Safety and Health Act of 1970 (hereinafter, the Act) because he was not authorized under Rule 1.70 of the General Rules for the

United States District Court for the Northern District of Illinois. While under Rule 1.70 b.1.(d) he may issue a search warrant upon a determination that probable cause exists in criminal cases, Rule 1.70 c. relating to duties and powers in civil proceedings provides for no such authority to issue warrants.

The Secretary of Labor, cites Title 28 U.S.C. § 636 (R.O.A., p. 56) to the effect that 28 U.S.C. § 636(a)(1) empowers magistrates not only to exercise all powers conferred or imposed upon United States Commissioners by law, but to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States" under 28 U.S.C. § 636(b)(3). The Respondent fails to see where that confers the judicial power not granted under the local rules of the District Court, which, though the rules

may vary from district to district, are binding and limit the powers of magistrates within a district. If Magistrates have all the powers of Judges, why not call them Judges and afford them all the emoluments and perquisites of Judges? If they do not have all the powers of Judges, are their powers not limited to those expressly provided by the local rules of the District Court?

The Seventh Circuit states in its opinion that,

> "The appellant argues that the warrant was invalid because it was signed by a magistrate rather than a judge, but fails to cite any legal support for this proposition. 'We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority,

are waived....' United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991)"

The Rules of the District Court were set forth in the appellant's brief. The self-serving citation of the Seventh Circuit's cases supporting issuance of OSHA warrants by magistrates only shows that no one reviewed the rules; waiver of a valid objection in In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co., 589 F.2d 1335, 1340 (7th Cir. 1979); In the Matter of the Establishment Inspection of Midwest Instruments Co., 900 F.2d 1150. 1153 (7th Cir. 1990); and In the Matter of Establishment Inspection of Cerro Copper Products Co., 752 F.2d 280, 282 (7th Cir. 1985) does not establish precedents precluding your petitioner from raising the issue of the magistrate's incapacity.

The Secretary avers that the Seventh Circuit has held that Magistrates may exercise their power to issue administrative warrants. In re Establishment Inspection of Gilbert & Bennett, Inc., 589 F.2d 1335 at 1340 & n.5. (7th Cir. 1979) The cited case notes that the Eastern District of Wisconsin has recently (1979) "passed new local rules which specifically authorize magistrates to issue administrative inspection warrants." This is not the situation in the Northern District of Illinois, Eastern Division, and without that authority, a Magistrate is prohibited from acting, or has acted without authority, which would make void his act. The simple stating of the District Court's own Rules should be sufficient "pertinent authority", and conclusive irrefutable reference to those rules should obviate florid verbosity

without the necessity of asserting that, "This is a matter of first impression". If the judiciary does not follow its own rules, what sort of regard for the law will the laity have?

The allegations made in the Application for Inspection Warrant under the Occupational Safety and Health Act of 1970 falsely allege that,

> "1. The aforesaid worksite houses the workplace of employees who are employed by an employer, believed to be engaged in a business affecting commerce, and is subject to the requirements of the Act.
>
> "2. The desired inspection is part of an inspection and investigation program, as set forth in greater detail below, designed to assure compliance

with the Act and is authorized by section 8(a) of the Act.

"3. On Feb. 10, 1989, the Occupational Safety and Health Administration (OSHA) received a written complaint from a friend of an employee of Microcosm, a typewritten transcribed copy which is attached hereto as Exhibit A. In accordance with the requirement of OSHA Field Operations Manual (FOM) Chapter IX A.B, hereto attached as Exhibit B, the complaint was initially investigated by sending a letter to the company, Microcosm, on February 22, 1989, informing the company of the complainants allegations and applicable OSHA

regulations. A copy of the letter is hereto attached as Exhibit C. A second attempt was made to obtain a response on June 6, 1989, when another letter was sent hereto attached as Exhibit D. On June 30, 1989, a third letter was sent requesting a response (Exhibit E). On July 13, 1989, a reply was received (Exhibit F), which was inadequate. An inspection was then scheduled and was attempted on August 30, 1989, when the owner, Mr. John Justice, denied entry, claiming the firm is only a fictitious name registered with Cook County and that he has no employees. On September 7, 1989, Mr. Justice was called in

an attempt to obtain further information on the complaint items and to determine if in fact he has any employees. No further information was obtained as Mr. Justice hung up after a few minutes stating 'This is wasting my time.' Said written complaint was submitted to OSHA in accordance with the provisions of section 8(f)(1) of the Act which states: (Here the Section is quoted.)

"The complaint alleges, in pertinent part, that the complainant believes that a violation of the Act exists which is a job health hazard at the above described workplace to which employees are exposed, to wit: Employees are becoming

ill due to solvent vapors in the work area.

"The complainant indicates that the existence of these conditions may be in violation of the Act/or the regulations issued pursuant thereto. Based on the information in the complaint, OSHA has determined that there are reasonable grounds to believe that such violations exist, and desires to make the inspection required by section 8(f)(1) of the Act.

"4. Pursuant to the authority of 29 CFR 1903.11(b) and OSHA's Field Operations Manual Chapter IX, attached hereto as Exhibit G the requested health inspection and investigation will extend to

those areas and/or conditions specified in the summary of the nonformal complaint, as well as to any hazardous work areas, procedures and/or working conditions within the plain view of the compliance officer during the course of the inspection, and any hazards brought to the attention of the compliance officer by an employee, where work is performed by employees of the employer, and to all pertinent conditions, structures, machines, apparatus, devices equipment, materials and all other things therein including records required by the Act and other records required by the Hazard Communication

Standard 29 CFR 1910.1200 and/or directly related to the purpose of the inspection - such records sought do not include medical records as defined in 29 CFR 1910.20(c)(6) related to the hazardous safety and/or health conditions referred to in paragraph 3 of this Application For Inspection Warrant and bearing on whether this employer is furnishing to its employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying with the occupational safety and health standards promulgated

under the Act and the rules, regulations, and orders issued pursuant to the Act. The health inspection and investigation of the establishment shall be in conformance with the requirements of OSHA Field Operations Manual (FOM) Chapter III, (illegible), (Inspection Procedures For Hazard Communication Standard 29CFR1910.1200) attached hereto as exhibit H.

"5. The inspection and investigation will be conducted by one or more compliance officers designated by the Secretary of Labor, United States Department of Labor, to be his authorized

representatives, pursuant to proper and reasonable administrative standards contained in regulations duly issued by the Secretary under authorization granted in in (sic) the Act and found in 29 CFR (illegible).

*****

"10. Proper entry pursuant to section 8(illegible) of the Act was attempted by Rick Foor, a duly authorized compliance officer of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, On the 30th day of August, 1909, but the right of entry was denied by the employer or an agent of the employer."

The above-quoted sworn statements from the application contain numerous disqualifying factual errors and assumptions, and some outright lies. Your petitioner has always asserted that he is not an employer and has no employees, there is no federal issue involved in engaging in commerce, and there was never any attempt to do any investigation to determine whether he is subject to the requirements of the Act; OSHA in its arrogance assumes that everyone is subject to the Act. (When Rick Foor was in your petitioner's office, he picked up a can of shaving cream (your petitioner has a full beard) and copied the address of Barbasol's office from the can, saying, "This gives us jurisdiction over your building." Your petitioner asked, "That would give you jurisdiction over every house in America, wouldn't it?" Foor replied, "That's correct.") It is an

outright lie that Rick Foor is or was a duly authorized compliance officer, because his authorization was never published as required by the Administrative Procedures Act, 5 U.S.C. § 552(a)(1). The failure to publish applies to the OSHA Field Operations Manual (FOM), which is fundamentally altered from the intent of the Congress in its reworked edition of the Occupational Safety and Health Act of 1970 Section 8(f)(1).

Is the Occupational Safety and Health Act of 1970 Constitutional as applied to an individual claiming citizenship within a State rather than the United States?

> The Act is in violation of "Amendment IX. The enumeration in the Constitution, of certain

> rights, shall not be construed to deny or disparage others retained by the people." And "Amendment X.
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

in part because the Act is overbroad, including within its jurisdiction those, including the your petitioner, who are excepted under Hale v. Henkel, 201 U.S. 43, 75 (1906),

> "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited.

He owes no duty to the state or to his neighbors to divulge his business or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and his property from arrest or seizure except under a warrant of law. He owes

nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate

its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute may plead the criminality of such corporation as a refusal to produce its books. To state

> this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

The "warrant of law" in the first paragraph of Hale v. Henkel quoted above obviously means a warrant of the standards required by the Fourth Amendment in criminal cases, not an administrative warrant, because natural persons are not subject to administration by the federal government under the original meaning and intent of the Constitution, except when they are within the territorial

jurisdiction of that government or have entered into some contractual relationship with it, other than the contract which is the Constitution.

> "If the doctrine of stare decisis has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." U.S. v. Mason, 412 U.S. 391 (1973)

Your petitioner has long relied upon Hale v. Henkel, and taken pride in this Court's opinion that, "He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business or to open his doors to an investigation, so far as it may tend to criminate him." If this

is no longer true, this Court should forthrightly say so, and delineate unequivocally the reasons why there should be no free men living in this land of the free.

Your petitioner has no privileges from the federal government and has no contracts with it. There is no jurisdiction over him except when he is on federal territory; the State of Illinois, which under the Constitution is guaranteed a Republican form of government, is not a federal territory.

Federal jurisdiction is limited to those territories and the District of Columbia over which the federal government has been granted control under Article I, Section 8, clause 17, and Article IV, Section 3, Clause 2. As a citizen of the State of Illinois, your petitioner has denied the jurisdiction of the federal

government over him throughout the course of these proceedings.

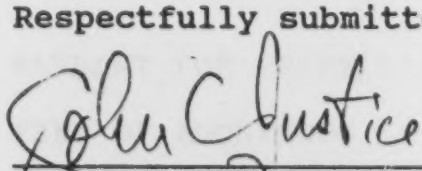
The Act is unconstitutional because it is an infringement on the reserved rights of the people and the States from whom the federal government received its limited grant of power, which rights are secured under the Ninth and Tenth Amendments to the Constitution.

This Court has been assailed by "liberals" as irredeemably conservative in its present composition. One would hope that their despondency is well founded, if the preservation of the Constitution is a conservative position. If the preservation, or conserving, of the gradual progressive distortion of the Constitution by courts over the past two centuries, or perhaps the preservation of the New World Order announced by that

paramount conservative who heads the Executive Department, is what the liberals fear, your petitioner takes no joy in their wailing at the new composition of the Court. But if this Court will redeem our lost liberties and restore to us the freedom and responsibility we once believed to be secured by the Constitution, its granting of this Petition will be cheered by all patriots. If there is no such likelihood, it is nonetheless worth the effort and filing fee to know, rather than to wonder.

The petitioner prays this Honorable Court reverse the errors of the trial court and the Court of Appeals.

Respectfully submitted,



John C. Justice, in propria persona
1699 S. 55th Avenue
Cicero, Illinois 60650
708-656-3250

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF)
ESTABLISHMENT INSPECTION OF)
MICROCOSM)

Case No. 89 C 8020

Docketed May 25, 1990

MEMORANDUM OPINION AND ORDER

The court grants the Secretary's motion for sanctions of $1,500 and attorneys' fees and costs of $619.79 against Mr. John C. Justice. A sanction is an appropriate remedy for violation of a court order; if no sanction were imposed in this case, Mr. Justice would have engaged in contumacious conduct with impunity. The court considers $1,500 to be an appropriate amount, reflecting $100 per day for the 15 days between this court's October 16 and October 31 Orders. Mr. Justice does not challenge the reasonableness of this particular figure. He must pay $1,500 to the Clerk of the Court.

The court also finds the Secretary's request for $619.79 in fees to be reasonable and appropriate under Donovan v. Burlington Northern, Inc., 781 F.2d 680 (9th Cir. 1986). Again, Mr. Justice does not question the propriety of the particular figure, but only the question of his liability.

ENTER:
(signed)
Ann Claire Williams, Judge
United States District Court
Dated: May 23 1990

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-2581

IN THE MATTER OF:
ESTABLISHMENT INSPECTION
OF MICROCOSM

APPEAL OF: JOHN C. JUSTICE,
doing business as MICROCOSM

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 8020—**Ann Claire Williams**, *Judge*.

ARGUED APRIL 15, 1991—DECIDED DECEMBER 17, 1991

Before BAUER, *Chief Judge*, COFFEY and MANION, *Circuit Judges*.

COFFEY, *Circuit Judge*. John C. Justice, doing business as Microcosm, appeals the district judge's order finding him in contempt of court for refusing to comply with an inspection warrant authorizing the inspection of his business premises for violations of the Occupational Safety and Health Act as well as the imposition of sanctions in the amount of $1,500 and attorney's fees and costs of $619.79.[1] We affirm the imposition of attorney's fees and costs of $619.79, and reverse the $1,500 sanction.

[1] In his notice of appeal, Justice also purports to be appealing a district court's order to show cause why he should not be ad-

(Footnote continued on following page)

I. BACKGROUND

On February 10, 1989, the Occupational Safety and Health Administration ("OSHA") district office in Calumet City, Illinois received an anonymous letter complaining about unsafe working conditions at Microcosm:

> "I am writing this for a friend who wants to make a complaint about working conditions in a factory at 1699 S.55th Ave. Cicero, Ill. 60650 tel no. 656-3250. MICROCOSM is the name. The smell from solvents used in the factory is so bad, my friend is sick practically every day. Others have the same problem. Something should be done about it because the Boss will not do anything about it. I hope you can visit the factory to see for yourself.
>
> "My friend does not want his name used and neither do I because I am only trying to help him get some relief."

The Area Director of OSHA sent a letter to Microcosm on February 22, 1989, informing it that the local office of OSHA had received a notice of a health hazard in the work place because "[e]mployees are becoming ill due to solvent vapors in the work area." The letter further stated:

> "We have not determined whether the hazards, as alleged, exist at your work place; and we do not intend to conduct an inspection at this time. However, since allegations of violations have been made, you are requested to investigate the alleged conditions and make any necessary corrections or modifications. Within 10 days of your receipt of this letter, please advise me in writing of the results of your investigation. Please provide any supporting documentation of your findings, including any applicable measurements

---

[1] *continued*

judged in contempt of court. But since he has neither raised arguments applicable to the order to show cause nor apprised us of how such an order might be appealable, we need not address that order.

> or monitoring results, and photographs which you believe would be helpful, as well as a description of any corrective action you have taken or are in the process of taking, including photographs of the corrected condition.
>
> . . . .
>
> ". . . If we do not receive a response from you within 10 calendar days or less indicating that appropriate action has been taken or that no hazard exists and why, an inspection may be conducted."

The owner, John C. Justice, responded on March 4, 1989:

> "I have inquired exhaustively and have found no one at this address who has complained to your agency as set forth in your letter dated February 22, 1989, to which I am replying timely as requested."

Considering Justice's letter of March 4 to be unresponsive, the area OSHA director sent a second and third letter to Microcosm on June 8, 1989, and June 30, 1989. The latter two letters included a copy of the February 22, 1989 letter and stated:

> "We have not received a reply from you concerning these allegations. Please advise this office of your findings and of any corrective action you have taken within 10 days. If we do not hear from you, an inspection may be scheduled."

Justice submitted a second letter July 12, 1989:

> "In response to your letters inquiring as to whether I have done anything about the complaint alleged in your letter dated February 22, 1989, I have addressed that issue in my letter dated March 4, 1989. . . .
>
> "In my letter I had asserted that no one at this address complained as alleged in your letter. Therefore, unless the complainant comes forward, and tells me what the unsatisfactory condition is, I have no knowledge of it or how to rectify it, and must assume that your office is lying."

On August 30, 1989, an OSHA compliance officer attempted to inspect the Microcosm premises, but John C. Justice

refused to allow entry. Another OSHA officer attempted to question the owner by telephone on September 7, 1989, but the appellant refused to talk with him.

On October 16, 1989, the OSHA compliance officer applied to a magistrate in the United States District Court for the Northern District of Illinois for an inspection warrant pursuant to 29 U.S.C. § 657(a).[2] The warrant application detailed the series of events leading up to the request for an inspection warrant. It defined the complaint OSHA received as a "non-formal complaint," which OSHA's Field Operations Manual Chapter IX requires to be dealt with initially with letters of inquiry, and in the event the employer fails to respond adequately, through an inspection. The application stated:

> "The complaint alleged, in pertinent part, that the complainant believes that a violation of the Act exists which is a job health hazard at the above described workplace to which employees are exposed, to wit: Employees are becoming ill, due to solvent vapors in the work area. The complaint indicates that the existence of these conditions may be in violation of the Act/or the regulations issued pursuant thereto. Based on the information in the complaint, OSHA has determined that there are reasonable grounds to be-

[2] Section 657(a) states:

> "In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

> lieve that such violations exist, and desires to make the inspection required by section [657(a)] of the Act."

The magistrate issued the inspection warrant as requested.

A compliance officer attempted to execute the warrant and inspect the business premises of Microcosm on October 17, 1989, but Justice refused the officer entry, stating that the warrant was not signed by a judge and further that OSHA lacked the authority to inspect private property. On October 25, 1989, the district court issued an order to show cause why Justice should not be adjudged in contempt of court for refusing to allow the inspection. After a hearing on October 31, 1989, the district judge held Justice in contempt and ordered the appellant, John C. Justice, to permit OSHA to inspect the business premises. Once again, the compliance officer attempted to execute the inspection warrant on November 1, 1989, but Justice again refused to allow the officer to inspect the factory. He did allow the officer to enter Microcosm's front door, but claimed that Microcosm consisted only of the hallway and the office. On November 13, 1989, Microcosm (Justice) filed an appeal of the district court's order holding him in contempt and requiring him to allow the inspection, and on November 14 he filed an emergency motion for a stay of the execution of the warrant, which this Court denied November 27, 1989. Justice then moved this Court to reconsider the denial of the stay.

On advice of counsel, Justice moved to dismiss his appeal on February 8, 1990, and we granted his motion. The district court conducted a hearing on February 15, 1990, regarding the Secretary's renewed motion for contempt sanctions. Justice stated that he would allow the inspection in order to avoid the financial sanctions as well as imprisonment, and the inspection occurred on the same day.[3] The district court entered its final order on May

[3] Subsequent to the inspection, the Secretary issued citations for violations of OSHA standards and proposed penalties of $12,940. Microcosm is currently challenging the proposed penalty before the Occupational Safety and Health Review Commission.

23, 1990, awarding attorney's fees and costs of $619.79 to OSHA for its efforts in attempting to execute the inspection warrant, and further sanctioned Justice $1,500. Since the government agrees with Justice that the $1,500 sanction was improper, we vacate the sanction without further discussion.

II. ISSUES

The appellant raises numerous constitutional and jurisdictional arguments unsupported by pertinent authority, which we deem unworthy of response. The only issues which merit our consideration are: (1) Whether the district court's action in holding Justice in contempt of court for refusing to honor the inspection warrant was proper; and (2) Whether the attorney's fees and costs were appropriately awarded for the government's efforts in attempting to enforce the inspection warrant.

III. CONTEMPT OF COURT

In his initial appearance before the magistrate, the appellant challenged his authority (magistrate's) to issue the inspection warrant and reiterated the same challenge before the district court and now this Court on appeal. Since Justice initially raised his objections to the warrant prior to being adjudicated in contempt of court, the contempt citation would be invalid if the warrant itself were ruled invalid. Thus, we initially address the issue of whether the magistrate's issuance of the OSHA inspection warrant was proper.

A. Validity of Warrant

The appellant argues that the warrant was invalid because it was signed by a magistrate rather than a judge, but fails to cite any legal support for this proposition. "We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived . . . ." *United States v.*

Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991). Nonetheless, even though the appellant has waived this argument, we note that it is well-established that magistrates are authorized to issue OSHA search warrants. *See In the Matter of Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, 1340 (7th Cir. 1979); *cf. In the Matter of Establishment Inspection of Midwest Instruments Co.*, 900 F.2d 1150, 1153 (7th Cir. 1990); *In the Matter of Establishment Inspection of Cerro Copper Products Co.*, 752 F.2d 280, 282 (7th Cir. 1985).

Justice argues that the magistrate lacked probable cause for issuing the warrant because the complaint upon which the warrant was based was anonymous. He bases this argument upon 29 U.S.C. § 657(f)(1), which states:

> "Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and *shall be signed by the employees or representative of employees* . . . ."

Without citing alternative case law or addressing our reasoning in *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1321-22 (7th Cir. 1980), in which we held that anonymous complaints were valid, Justice merely asserts that our decision was wrong. Despite the appellant's disagreement with our precedent, however, *Burkart Randall* is dispositive of his argument:

> "Section 8(f)(1) [29 U.S.C. § 657(f)(1)] does not, however, prescribe minimum requirements for acceptance of an employee complaint by OSHA. Rather, it identifies a particular set of circumstances under which OSHA *must* inspect in response to an employee complaint. We can find no indication in the Act or in judicial interpretations of section 8(f)(1) that OSHA may

not determine that an inspection is justified on the basis of an informal employee complaint. Indeed, one court has noted that OSHA

> 'is required to investigate all complaints whether formal (signed by someone) or anonymous (from a confidential informant, so to speak).'

Dravo Corp. v. Marshall, 5 OSHC (BNA) 2057, 2059 (W.D.Pa. 1977), *aff'd mem.*, 578 F.2d 1373 (3d Cir. 1978). While we need not decide whether OSHA *must* inspect in response to all complaints, we can find no basis for holding that only those complaints which comply with section 8(f)(1) may form the basis for an OSHA inspection."

Burkart Randall, 625 F.2d at 1321-22. Thus, the anonymous nature of the complaint that provided the basis for the inspection warrant fails to invalidate it.[4] *Cf. Marshall*

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[4] Justice seems to argue that if there is not specific authorization published in the Federal Register as required under the Administrative Procedures Act, 5 U.S.C. § 552(a)(1), any inspection based upon an informal complaint is invalid. But as a number of courts have held, not all delegations of authority "must be published in order to be effective. Under the provisions of 5 U.S.C. § 552, the requirement for publication attaches only to matters which if not published would adversely affect a member of the public." *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970). *Accord Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1982); *New York v. Lyng*, 829 F.2d 346, 354 (2nd Cir. 1987); *United States v. Goodman*, 605 F.2d 870, 887-88 (5th Cir. 1979); *Cubanski v. Heckler*, 781 F.2d 1421, 1428-29 (9th Cir. 1986); *Lonsdale v. United States*, 919 F.2d 1440, 1446 (10th Cir. 1990). Justice certainly was not prejudiced from the complaint being anonymous, since 29 U.S.C. § 657(f)(1) provides that "upon the request of the person giving such notice [of an OSHA violation], his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section." Thus, it is immaterial whether authority to investigate informal complaints is published in the Federal Register.

(Footnote continued on following page)

v. Horn Seed Co., Inc., 647 F.2d 96, 100 n.3 (10th Cir. 1981) ("Congress did not intend that complaints complying with section 8(f)(1) form the only basis for an OSHA inspection.").

In a final meritless argument regarding the validity of the search warrant, Justice cites 29 U.S.C. § 658(c) for the proposition that the warrant was untimely. The section states: "no citation may be issued under this section after the expiration of six months following the occurrence of any violation." This argument is apparently based upon the time period from the filing of the complaint on February 10, 1989, to the application for a warrant on October 16, 1989. Justice has misread the statute, for the statute refers to issuing a citation for an OSHA violation within six months of the inspection revealing the violation. The section is unrelated to the time period from the filing of a complaint with OSHA to the time when OSHA responds.

After our review of the record, we hold that the warrant was valid, as the appellant has failed to establish any error in the warrant or the magistrate's issuing of it.

B. Violation of Warrant

The OSHA compliance officer attempted to execute the warrant of inspection on October 17, 1989, the day after the warrant was issued, and again on November 1, 1989, the day after the district court found Justice in contempt for failure to comply with the warrant when it was presented to him on October 17. Either instance of Justice's

---

[4] *continued*

In a similar vein, the appellant challenges the authority of the attorney for the Department of Labor to initiate this suit and the authority of the compliance officer to enforce OSHA regulations. Justice has failed to demonstrate prejudice from the failure to publish the specific authority granted to these individuals, as it is immaterial which persons carry out the delegated authority of the Secretary of Labor.

refusal to comply with the court order to allow inspection was adequate to support a contempt citation. "Civil . . . contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 499 (1949). The appellant argues that the district court erred in holding him in contempt because "no contempt was intended." It is uncontested that Justice knew he was violating a court order when he refused to allow the inspection, and he fails to cite any pertinent authority for the proposition that his subjective belief that the warrant was invalid justified him in noncompliance. Furthermore, even if his belief was sincere, making his violation unwillful, "[t]he absence of willfulness does not relieve from civil contempt." *Id.* Thus, we hold that the district court properly held Justice to be in civil contempt of court when he refused to comply with the inspection warrant.

IV. ATTORNEY'S FEES AND COSTS

The Secretary requested costs for attempting to execute the inspection warrant as follows: attorney's fees, $474.08; secretarial costs, $47.75; benefits, $73.06; and overhead, $24.90, for a sum of $619.79. The district court granted the request for fees, finding it to be "reasonable and appropriate." Initially, Justice argues that since the district court's October 31, 1989 order stated that "[t]he Secretary should submit a bill of costs within ten (10) days," the February 15, 1990 filing of fees was untimely. Since Justice refused to allow an inspection of his premises until February 15, 1990, it would have been impossible for the Secretary to finally determine the amount of costs until such time as the inspection was completed. Thus, the request for fees was not untimely. Second, Justice argues that part of the attorney's fees the district court awarded were related to his initial appeal to this Court of the magistrate's issuance of the inspection warrant, legal work which was unrelated to the contempt petition and thus

unrecoverable. In its order awarding attorney's fees and costs in the case before us, the district court noted that "Mr. Justice does not question the propriety of the particular figure, but only the question of his liability." The district court's order demonstrates that Justice failed to challenge the amount of the attorney fees imposed in the district court and is raising a challenge to that amount for the first time in this appeal. "[T]his court has repeatedly stated that arguments raised for the first time on appeal are waived." *United States v. Harty*, 930 F.2d 1257, 1261 (7th Cir. 1991). We deem John C. Justice's argument as to the amount of attorney fees waived. Finally, the appellant argues that benefits and overhead are fixed expenses that should not be charged to him. This contention is likewise raised for the first time on appeal, and is thus waived. But we note that it is clearly valid to award attorney's fees and costs for preparing and prosecuting a contempt petition, *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 748 (7th Cir. 1976), and such fees may include "factors such as overhead and support personnel." *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 862 (7th Cir. 1981). Thus, it was proper for the district judge to compensate OSHA for the expenses incurred in enforcing this contempt citation.

V. CONCLUSION

We find Justice's arguments on appeal to be lacking in merit and without arguable support in the legal authorities he cited. Many of the arguments he raised are frivolous and thus sanctionable, *see Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986), especially the meritless arguments regarding jurisdiction and the alleged unconstitutionality of OSHA, which were so patently frivolous we decline to address them. Nonetheless, we choose not to sanction the appellant in this instance. He should consider himself fortunate to be taxed costs only in the amount of $619.79 for his contumacious conduct. Since the appellant has failed to demonstrate error in the contempt citation or the impo-

sition of the attorney's fees and costs, the district court's award of fees and costs is AFFIRMED. We agree with the appellant and the government that the sanction of $1,500 was improper, and it is thus REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-17-91

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
OSHRC Docket No. 90-2086

LYNN MARTIN, Secretary of Labor,)
United States Department of Labor,)
Complainant)
v.)
JOHN C. JUSTICE, an Individual)
d/b/a/ MICROCOSM,)
Respondent)

SETTLEMENT AGREEMENT

Complainant, Lynn Martin, Secretary of Labor, United States Department of Labor, and Respondent, John C. Justice, an Individual d/b/a Microcosm, pursuant to Rule 100 of this Commission hereby agree to the disposition of this matter on the following terms:

I

Complainant hereby amends the Willful Citation and Notification of Penalty No. 2 to propose a penalty of $3,400.00. The parties agree that the amount of such proposed penalty, as amended, is appropriate and reflects due consideration of the size of the business of the respondent, the gravity of the violation alleged, the good faith of the respondent, and the history of previous violations, if any, as required by §17(j) of the Act.

II

Respondent has no objection to the complainant amending the Willful Citation and Notification of Penalty No. 2 as set forth in paragraph I above.

III

Respondent hereby withdraws its Notice of Contest to the Serious Citation and Notification of Penalty No. 1, Willful

Citation and Notification of Penalty No. 2 and Other Citation and Notification of Penalty No. 3, as amended herein. Respondent makes the following representations and assurances to complainant:

a. The conditions alleged in the Citations and Notifications of Penalty will be abated within 60 days of the date of the date that this settlement agreement becomes a final order of the Review Commission. Nothing in this agreement shall be interpreted as a waiver of respondent's right to file, in good faith, a Petition For Modification of Abatement Date(s).

b. Respondent in the future will in good faith continue to comply, with the provisions of the Act, and applicable standards promulgated pursuant thereto.

c. Respondent will forward to complainant a certified check payable to "Occupational Safety and Health Administration-Department of Labor" for $10,840.00, the unpaid balance of the penalties herein within 90 days from the date that this agreement becomes a final order of the Review Commission.

d. Respondent herein agrees to the filing of a Petition for Summary Enforcement with the Seventh Circuit Court of Appeals pursuant to Section 660(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 601 et seq.) sixty days after this agreement has become a Final Order of the Occupational Safety and Health Review Commission. Respondent further agrees to the entry of a decree enforcing the aforesaid order.

e. Respondent agrees and consents to permit a warrantless followup inspection of his worksite no sooner than 60 days

after the date that this matter becomes a final order of the Review Commission.

This inspection will be conducted to determine abatement of the conditions which were set forth in the citations and notifications of penalty and in addition will be made pursuant to the instructions contained within the Field Operations Manual of the Occupational Safety and Health Administration.

IV

Based on the aforesaid assurances and representations by respondent, complainant has no objection to the withdrawal of the Notice of Contest.

V

Respondent certifies that there is no authorized employee representative, at respondent's workplace. It is hereby further certified by respondent that this Settlement Agreement has been served on employees, by posting this agreement in a place where the Citation is required to be posted, in accordance with Rules 7 and 100 of the Commission's Rules of Procedure.

VI

The complainant and the respondent agree that an order should be entered which:

A. Amends the Willful Citation and Notification of Penalty No. 2, as set forth above.

B. Allows respondent to withdraw it Notice of Contest to the Serious Citation and Notification of Penalty No. 1, Willful Citation and Notification of Penalty No. 2 and Other Citation and Notification of Penalty No. 3, as amended herein.

C. Affirms the Serious Citation and Notification of Penalty No. 1, Willful Citation and Notification of Penalty No. 2 and Other Citation and Notification of

Penalty No. 3, as amended, as a final and enforceable order of the Review Commission, and affirms the penalties in the amounts proposed with no costs, fees or other expenses to be assessed or awarded to any of the parties in this litigation.

Dated: 1-14-92

JOHN C. JUSTICE, an Individual
d/b/a MICROCOSM, Respondent

(Signed)

(Signed)
LOWELL H. BECRAFT, Jr., Esq.
Attorney for Respondent

Department of Labor, Complainant
MARSHALL J. BREGER Solicitor of Labor
JOHN H. SECARAS Regional Solicitor
(Signed by Leonard Borden)
LEONARD BORDEN, Attorney
Attorneys for Lynn Martin,
Secretary of Labor, United States

AFFIDAVIT

John C. Justice, being sworn, deposes and states that on January 14, 1992, he appeared before the administrative law judge, the Honorable Benjamin Loye, expecting a "full and fair hearing" of the issues he had raised over the course of three years since he was first contacted by the Occupational Safety and Health Administration, "OSHA", by letter dated February 22, 1989. The hearing was begun by the administrative law judge, the Honorable Benjamin Loye. The Solicitor of Labor, counsel for OSHA, and respondent Justice's counsel held a conference outside the hearing. Justice's counsel then called him outside and told him that the Solicitor said that the penalties of almost 13,000.00 were only proposed penalties, and that in view of Justice's recalcitrance and especially his answer to

interrogatories in which he stated that he was plainly indifferent as to whether he was in compliance with OSHA regulations, if Justice did not withdraw his Contest of the findings of OSHA and the proposed penalties, he would recommend to the Occupational Safety and Health Review Commission, "OSHRC", that the proposed penalties be maximized, and that the resulting penalties would be in the neighborhood of 70,000.00, a figure which would be ruinous to Justice. The issues had already been heard and declared frivolous by the Seventh Circuit Court of Appeals, and consequently would not be heard at this hearing or certified for appeal to the 7th Circuit.

Because the alternatives of paying 11,000.00, generously reduced from 13,000.00 by the Solicitor of Labor, and paying 70,000.00 with no likelihood of

hearing or reversal in the Seventh Circuit, and extremely little likelihood of granting of certiorari and reversal in the Supreme Court, Justice withdrew his Notice of Contest to the Citations and Notification of Penalties and against all his principles and beliefs in the rectitude of his cause signed a Settlement Agreement, which was done, despite lack of any indication to the contrary, under duress and threat of punishment, and bears the threat of continued punishment in the concluding paragraph of § III e. of the Settlement Agreement.

John C. Justice

STATE OF ILLINOIS)
COUNTY OF C O O K)
Sworn to and subscribed before me this 13th day of April, 1992.

"OFFICIAL SEAL"
DOLORES GAJDA
Notary Public, State of Illinois
My Commission Expires 6/15/93

Dolores Gajda

STATUTES AND REGULATIONS INVOLVED

FUNDAMENTAL ORGANIC LAW, CONSTITUTIONAL PROVISIONS & STATUTES

The Declaration of Independence--1776

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. .... --He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance....--He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation;..."

Article II of the Articles of Confederation

"Article II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Article III of the Articles of Confederation

"Article III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or

any other pretence whatever."

Article IX, ppg. 4 of the Articles of Confederation

"The united states in congress assembled shall also have the sole and exclusive right and power of ...--regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated--..."

Preamble to the Constitution for the United States

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our

Posterity, do ordain and establish this Constitution for the United States of America."

Article I, §8, cl. 3 of the Constitution

["The Congress shall have Power...]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article I, §8, cl. 17 of the Constitution

["The Congress shall have Power...] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals,

dock-Yards and other needful Buildings;--And "

Article IV, §3, cl. 2 of the Constitution

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI, cl. 2 of the Constitution

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourth Amendment to the Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Ninth Amendment to the Constitution

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment to the Constitution

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Occupational Safety and Health Act of 1970

§(2)(b)(3)

"by authorizing the Secretary of Labor to set mandatory occupational

safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;"

§8(f)(1)

"Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be

signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary

determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of employees in writing of such determination."

29 CFR § 1903.11(a)

"Any employees or representative of employees who believe that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a Compliance Safety and Health Officer. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the

employees or representative of employees. A copy shall be provided the employer or his agent by the Area Director of Compliance Safety and Health Officer no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available by the Department of Labor."

OSHA FIELD OPERATIONS MANUAL "FOM"

FOM at p. IX-3; 3 Empl. Safety & Health Guide (CCH) at Paragraph 7976.120.

Examples of nonformal complaints:

(a) Oral complaints filed by employees.

(b) Unsigned written complaints filed by employees.

(c) Written and oral complaints filed by nonemployees. (Persons or groups other than current employees or their representatives.)

Paragraph 7976.175

If an employer persistently refuses to respond to OSHA's inquiries, the Area Director activates the nonformal complaint for inspection.

From Footnote 5 and text at page 7 of the Secretary's Brief.

The Administrative Procedures Act, 5 U.S.C. §§ 552(a)(1)(C), (D), and (E)

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which the

employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and content of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general

policy or interpretations of general applicability formulated and adopted by the agency;

and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF: :
ESTABLISHMENT INSPECTION OF: :
Microcosm :

Case No. 89 M 353

WARRANT FOR INSPECTION UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

TO: Rick Foor, AND/OR ANY OTHER COMPLIANCE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR.

Sworn application having been made, reasonable legislative and administrative standards having been prescribed, and probable cause shown by Rick Foor of the Occupational Safety and Health Administration, United States Department of Labor, for an inspection and investigation of the workplace described as:

Microcosm
1699 S. 55th Avenue
Cicero, IL 60650

IT IS HEREBY ORDERED that based on the grounds set forth in the sworn application for inspection warrant and pursuant to section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., hereinafter referred to as the Act, YOU ARE AUTHORIZED to enter the above described premises during regular working hours or at other reasonable times, to conduct an inspection and investigation, and to inspect and investigate in a

reasonable manner and to a reasonable extent including but not limited to authority to take environmental samples including samples taken by personal sampling devices attached to employees and to take or obtain photographs related to the purpose of the inspection and questioning privately any owner, agent, employer or employee of the establishment, the workplace or environment where work is performed by employees of the employer specifically, but limited to the unhealthful work practices, areas, and/or conditions alleged in the complaint received by the Occupational Safety and Health Administrator under 8(f)(1) of the Act, to wit: Employees are becoming ill due to solvent vapors in the work area as well as to any hazardous work areas, procedures, and/or working conditions within the plain view of the compliance officer and any hazards brought to the attention of the compliance officer by an employee and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including a review of records required by the Act and other records including the Hazard Communication Standard 29CFR1910.1200 and/or which are directly related to the purpose of the inspection - such records do not include medical records as defined in 29 CFR 1910.20(c)(6)) related to the above described practices, areas or working conditions and bearing on whether this employer is furnishing to its employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether this employer is complying

with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

A return shall be made to this Court showing that the inspection has been completed, within ten (10) days of this date.

DATED: October 16 1989

(Signed James T. Balog)
UNITED STATES MAGISTRATE

RETURN

INSPECTION of the establishment premises described in this warrant was made on unexecuted , 1989

Rick Foor
Compliance Officer
Occupational Safety and Health Administration
U.S.Department of Labor
1600 167th St. Suite 12
Calumet City, IL 60409

Subscribed and sworn to before me this _____ day of _____, 1989

(UNITED STATES MAGISTRATE or NOTARY PUBLIC)

SOL#

January 30, 1989

Mr. Eugene Saturn

Dept. of Labor OSHA

1600 167th Street

Calumet City, Ill. 60409

Dear Mr. Saturn:

I am writing this for a friend who wants to make a complaint about working conditions in a factory at 1699 S. 55th Ave. Cicero, Ill. 60650 tel no. 656-3250. MICROCOSM is the name. The smell from solvents used in the factory is so bad my friend is sick practically every day. Others have the same problem. Something should be done about it because the Boss will not do anything about it. I hope you can visit the factory to see for yourself. My friend does not want his name used and neither do I because I am only trying to help him get some relief.

Thank You.

(2)

No. 91-1680

Supreme Court, U.S.
FILED
JUN 19 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. JUSTICE, PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
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NATHANIEL I. SPILLER
ELIZABETH HOPKINS
Attorneys
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the district court properly assessed petitioner with attorneys' fees and costs for refusing to comply with an inspection warrant issued under the Occupational Safety and Health Act of 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1680

JOHN C. JUSTICE, PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 951 F.2d 121. The order of the district court (Pet. App. i) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1991. On April 3, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 15, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 10, 1989, the district office of the Occupational Safety and Health Administration (OSHA) in Calumet City, Illinois, received an unsigned letter stating:

> I am writing this for a friend who wants to make a complaint about working conditions in a factory at 1699 S. 55th Ave. Cicero, Ill. 60650 tel no. 656-3250. MICROCOSM is the name. The smell from solvents used in the factory is so bad, my friend is sick practically every day. Others have the same problem. Something should be done about it because the Boss will not do anything about it. I hope you can visit the factory to see for yourself.
>
> My friend does not want his name used and neither do I because I am only trying to help him get some relief.

Pet. App. 2; see *id.* at xxxix. The OSHA Area Director sent a letter to Microcosm on February 22, 1989, informing it that OSHA had received a complaint concerning solvent vapors that were making employees ill. *Id.* at 3. OSHA explained in the letter that it did not currently intend to conduct an inspection, but it requested that Microcosm itself "investigate the alleged conditions" and report to OSHA the results of the investigation, and any corrective action taken, within ten days. *Id.* at 2-3.

Petitioner is the owner of Microcosm. Rather than investigate the alleged conditions, petitioner responded that he "inquired exhaustively and * * * found no one at this address who has complained to your agency as set forth in your letter dated February 22, 1989." Pet. App. 3. OSHA repeated its request that Microcosm investigate the conditions. *Ibid.* On August 30, 1989, an OSHA compliance officer attempted

to inspect Microcosm, but petitioner refused to allow the officer to enter the property. *Id.* at 3-4. When an OSHA representative contacted petitioner by phone, petitioner refused to discuss the matter. *Id.* at 4.

2. On October 16, 1991, OSHA applied for and received an inspection warrant from a magistrate in the United States District Court for the Northern District of Illinois. Pet. App. 4. The next day, an OSHA compliance officer attempted to inspect the Microcosm premises pursuant to the warrant, but petitioner denied the officer entry. *Id.* at 5. On October 25, 1989, the district court ordered petitioner to show cause why he should not be held in contempt for refusing to obey the warrant. *Ibid.* Following a hearing on October 31, 1989, the court held petitioner in contempt and ordered him to allow an inspection. *Ibid.*

The following day, the compliance officer again attempted to inspect the premises, but petitioner merely allowed the officer to enter the front door, claiming that Microcosm consisted only of an office and hallway. Pet. App. 5. After OSHA renewed its motion for contempt, petitioner agreed to allow an inspection, which took place on February 15, 1990. *Ibid.* On May 23, 1990, in its final order on contempt sanctions, the district court awarded OSHA $619.79 in attorneys' fees and costs for its efforts in attempting to execute the warrant. The court of appeals affirmed that award. *Id.* at 5-6; see *id.* at i.*

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* The district court additionally sanctioned petitioner $1500, but OSHA agreed that the sanction should be vacated. Pet. App. i, 6. Following the inspection, OSHA issued citations for numerous serious and willful violations of occupational safety and health standards. It proposed penalties totalling $12,940. OSHA and petitioner eventually entered into a settlement concerning those citations. See *id.* at xiii-xvi.

ARGUMENT

The court of appeals correctly concluded that the magistrate issued a valid OSHA inspection warrant, that petitioner contumaciously refused to comply with the warrant, and that petitioner therefore was liable to OSHA for attorneys' fees and costs associated with his contempt. Petitioner presents no issue warranting this Court's review.

The Occupational Safety and Health Act of 1970 authorizes OSHA to "inspect and investigate" any place of employment within its jurisdiction to carry out the purposes of the Act. See 29 U.S.C. 657(a). In this case, the OSHA properly applied for and received a judicial warrant to inspect petitioner's premises after petitioner failed take action in response to OSHA's informal inquiry concerning alleged health and safety violations. The court of appeals correctly rejected petitioner's argument that only a district judge could issue the warrant, noting that "it is well-established that magistrates are authorized to issue OSHA search warrants." Pet. App. 6-7. See, *e.g.*, *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340 (7th Cir. 1979); see also 28 U.S.C. 636.

OSHA's warrant application satisfied this Court's ruling in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), that the agency could obtain a warrant by providing specific evidence of a health or safety violation. As the court of appeals explained (Pet. App. 7-8), OSHA's receipt of a credible anonymous complaint alleging a specific violation provided a sufficient basis for the inspection warrant in this case. See, *e.g.*, *Marshall* v. *Horn Seed Co.*, 647 F.2d 96, 100 n.3 (10th Cir. 1981); *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1321-1322 (7th Cir. 1980). As that court also explained (Pet. App.

8 n.4), OSHA was not required to publish notice in the *Federal Register* that it would conduct inspections based on informal complaints. Cf. *United States* v. *Alaska*, 112 S. Ct. 1606, 1618-1619 (1992).

The court of appeals correctly observed that petitioner's remaining arguments are either frivolous or were waived below. See Pet. App. 6, 11-12. The inspection warrant was valid and petitioner was properly assessed attorneys' fees and costs for his failure to comply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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